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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOHN ESPINOZA, an individual,

Plaintiff,

-vs-

CITY OF IMPERIAL, a public entity;
MIGUEL COLON, an individual; IRA
GROSSMAN, an individual; and DOES 1
THROUGH 50, inclusive,

Defendants.

CASE NO.: 07CV2218 LAB (RBB)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANT IRA GROSSMAN'S
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT**

*Assigned to: Hon. Larry Alan Burns, Courtroom
9, 2nd Floor*

MOTION

DATE: June 2, 2008

TIME: 11:15 a.m.

COURTROOM: 9

Action Filed: 11/20/07

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
DEFENDANT IRA GROSSMAN'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I. INTRODUCTION

Defendant IRA GROSSMAN moves this Court to dismiss Plaintiff's Complaint against him. As discussed below, Civil Code §47 is not applicable to make Defendants conduct privileged. There was no official proceeding at the time of the conduct alleged. Section 47.5 expressly provides an exception to the privilege where a report is made to a police officer's employer department. Plaintiff can demonstrate actual malice, defeating 47(c) privilege. Plaintiff's allegations are sufficient to support invasion of privacy and emotional distress actions against GROSSMAN. Plaintiff can amend the Complaint to state a cause of action against GROSSMAN.

II. STATEMENT OF FACTS

The pertinent allegations as indicated in Plaintiff's Complaint (First Amended Complaint, filed March 14, 2008) are essentially as follows:

Plaintiff was employed as a Police Officer by the CITY OF IMPERIAL in or about 2002. Plaintiff alleges that he was terminated from employment because of disability or perceived disability and in retaliation for his protected marital status, protected union activity, and for requesting family leave. Plaintiff also alleges that he was discriminated against, that he was denied reasonable accommodation, that his privacy rights were violated, and that he was defamed. Plaintiff alleges that all the Defendants were the agents of the others.

Plaintiff alleges that his separation and later marital dissolution with his ex-wife was contentious and mentally stressful, but that the unfortunate circumstances did not affect the performance of his duties for Defendants. Defendants, without Plaintiff's consent, disclosed private and confidential information about Plaintiff to third parties, including, but not limited to,

1 the entire police force of IMPERIAL. Plaintiff's allegations of harassment arise from the Police
 2 Chief Defendant COLON'S conduct in interfering with Plaintiff's private and confidential
 3 matters. Plaintiff alleges that COLON caused a police report to be falsified, in violation of state
 4 and federal law, in order to accomplish a wrongful termination of Plaintiff.

5 Shortly after Plaintiff requested newborn family care leave, Plaintiff was wrongfully
 6 required to undergo an unwarranted psychological examination, conducted by Defendants
 7 COLON and GROSSMAN. Defendant GROSSMAN, among other things, made false
 8 statements regarding Plaintiff, in writing, to the other Defendants, that Plaintiff lacked integrity,
 9 and falsely concluded that Plaintiff was unfit for duty. Plaintiff alleges that Defendants acted
 10 with actual malice and reckless disregard for the truth.

11 Ultimately, the foregoing allegations form the basis for Plaintiff's claims for civil rights
 12 violations and wrongful termination in violation of public policy. Defendant GROSSMAN
 13 challenges the legal sufficiency of Plaintiff's claims for defamation, invasion of privacy, and
 14 intentional infliction of emotional distress against him. The only facts presented by Defendant in
 15 support of his motion are the allegations of Plaintiff's Complaint. *See* Defendant's Request for
 16 Judicial Notice.

17 18 **III. LEGAL ARGUMENT**

19 20 **A. STANDARD OF REVIEW ON MOTION TO DISMISS**

21
 22 In reviewing a Rule 12(b)(6) motion, the court must accept as true all material allegations
 23 in the complaint, as well as reasonable inferences to be drawn from them. *Pareto v. F.D.I.C.*
 24 (9th Cir. 1998), 139 F3d 696, 699. The test is whether the facts, as alleged, support any valid
 25 claim entitling plaintiff to relief, not necessarily the one intended by plaintiff. Thus, a complaint
 26 should not be dismissed because plaintiff erroneously relies on the wrong legal theory if the facts
 27 alleged support any valid theory. *Haddock v. Board of Dental Examiners of Calif.* (9th Cir.
 28 1985) 777 F2d 462, 464. Moreover, Rule 12(b)(6) dismissals are "especially disfavored in cases

1 where the complaint sets forth a novel legal theory that can best be assessed after factual
2 development.” *Baker v. Cuomo* (2nd Cir. 1995) 58 F3d 814, 818–819.

3 When a complaint's allegations are capable of more than one inference, the court must
4 adopt whichever inference supports a valid claim. *Columbia Natural Resources, Inc. v. Tatum*
5 (6th Cir. 1995) 58 F3d 1101, 1109. Some courts hold motions to dismiss civil rights complaints
6 should be “scrutinized with special care.” *Lillard v. Shelby County Board of Ed.* (6th Cir. 1996),
7 76 F3d 716, 724 (internal quotes omitted), *See also, Johnson v. State of Calif.* (9th Cir. 2000)
8 207 F3d 650, 653 (liberal construction rule particularly important in civil rights cases).

9
10 **B. CALIFORNIA CIVIL CODE SECTION 47 DOES NOT RENDER THE ALLEGED**
11 **DEFAMATION PRIVILEGED BECAUSE THE COMMUNICATION WAS NOT MADE**
12 **IN AN OFFICIAL PROCEEDING.**

13
14 Defendant contends that his defamatory communications were made in an official
15 proceeding, alleging, apparently, that the forced psychological evaluation was warranted. In
16 fact, Plaintiff alleges that his divorce and the existence of mental stress did not affect his
17 performance of duties for the CITY. [Plaintiff’s Complaint, Paragraph 11]. Nor did Plaintiff
18 ever seek a determination or verification of any disability. Plaintiff essentially alleges that
19 Defendants maliciously fabricated the existence of mental disability in order to effect a
20 termination of Plaintiff. However, significantly, Defendant fails to show that his report to
21 Plaintiff’s employer was authorized by law. To the contrary, Defendants should have applied for
22 Plaintiff’s disability retirement on Plaintiff’s behalf, pursuant to California Government Code
23 §21153, but has failed to perform a mandatory duty. Thus Defendants engage in so-called
24 “proceedings” to advance their own interests, but refuse and fail to perform duties that are
25 actually authorized and mandated by law.

26 *Pettus v. Cole* (1996), 49 Cal.App.4th 402, involved the disclosure of two psychiatric
27 evaluations in connection with the employee’s request for stress-related disability leave. The
28 Court held that the disclosures violated the Confidentiality of Medical Information Act since

1 Civil Code §56.10 limits permissible disclosure to a description of any functional limitations that
 2 may have entitled the employee to leave work and also explicitly prohibits disclosure of medical
 3 cause. Importantly, the Court further held that the psychiatrists' disclosures were not privileged
 4 under either Civil Code §47(b) or §47(c), since the evaluations were not done in a judicial or
 5 quasi-judicial proceeding. "The policies underlying this statute are clearly intended to promote
 6 the accessibility or viability of the judicial system". "One of the primary factors which
 7 determines if a proceeding is quasi judicial is whether the administrative body involved is
 8 entitled to hold hearings and decide issues by application of rules of law and to ascertain
 9 facts...Pettus's request for leave and the subsequent disability verification procedure involved no
 10 such dispute resolution mechanism, no hearings, and the only decision makers involved were a
 11 private employer, Du Pont, and its employees and agents." Although Pettus involved a private
 12 employment dispute, the facts of this case are similar. Defendants did not hold hearings, there
 13 was no dispute resolution mechanism, and the only decision makers were the Defendants and
 14 their agents. The governing board of the CITY was not involved in the evaluation forced on
 15 ESPINOZA.

16 In *Gallanis-Politis v. Medina* (2007) 61 Cal.Rptr.3d 701, a county employee's retaliation
 17 lawsuit against her supervisors was subject to a motion to strike under the anti-SLAPP (strategic
 18 lawsuit against public participation) statute. The employee's allegations of unprotected activity
 19 by supervisors were incidental to her principal claim that supervisors conducted a pretextual
 20 investigation and prepared a false report against her, which was undertaken in response to her
 21 pending lawsuit. It should be noted that in this action, ESPINOZA is not claiming defamation
 22 based on communications after this lawsuit or claim was initiated, but rather on events and
 23 conduct that preceded this judicial action, that were not protected by the privilege.

24
 25 **C. DEFENDANTS' RELIANCE ON *SHADDOX* IS MISPLACED IN LIGHT OF THE**
 26 **EXCEPTION OF CIVIL CODE §47.5**

27
 28 Defendant relies heavily on the case of *Shaddox v. Bertani* (2003), 110 Cal.App.4th

1 1406. This reliance is misplaced, however, in light of California Civil Code §47.5, which
 2 provides that, notwithstanding the CC § 47(b) privilege, one who files a complaint with a peace
 3 officer's employer charging the officer with misconduct, criminal conduct or incompetence may
 4 be liable for defamation if the complaint was *knowingly false* and made with *spite, hatred or ill*
 5 *will* (emphasis added).

6 One court held that, by restricting defamatory speech against peace officers while
 7 leaving intact the CC § 47(b) privilege against all other public officials, CC § 47.5 represents
 8 *unconstitutional content-based discrimination*. See *Walker v. Kiouisis* (2001) 93 CA4th 1432,
 9 1446- 1457.

10 However, more recent authority in *Loshonkohl v. Kinder* (2003) 109 CA4th 510, 515-
 11 518, has held that § 47.5 is constitutional in view of a post-*Walker* Supreme Court case, *People*
 12 *v. Stanistreet* (2002) 29 C4th 497, that upheld the constitutionality of a statute (Pen.C. § 148.6)
 13 making the filing of a knowingly false misconduct allegation against a peace officer a
 14 misdemeanor. The exception applies here, where the complaint of police officer misconduct or
 15 incompetence was made to ESPINOZA'S Police Department employer. Plaintiff alleges that
 16 the communication was made with actual malice and reckless disregard for the truth. Indeed,
 17 this exception is expressly discussed in *Shaddox* (at fn. 12, 1417).

18 19 **D. THE 47(c) PRIVILEGE CAN BE OVERCOME BY MALICE.**

20
21 Defendant admits that 47(c) applies to communications made "without malice, to a
 22 person interested therein...". Plaintiff has adequately alleged malice in the Complaint. See
 23 Plaintiff's Complaint, Paragraph 151. Any ambiguity should be resolved in favor of supporting a
 24 valid claim. *Columbia Natural Resources, Inc. v. Tatum* (6th Cir. 1995) 58 F3d 1101, 1109. In
 25 particular, Defendant GROSSMAN had no basis to conclude that Plaintiff lacked integrity.
 26 Defendant GROSSMAN admitted that he based his conclusion of Plaintiff's lack of integrity on
 27 the supposed failure of Plaintiff to disclose the length of time that Plaintiff had been treating with
 28

1 his own family therapist. GROSSMAN admits that he asked ESPINOZA if he had ever been
 2 treated by a mental health professional. GROSSMAN admits that ESPINOZA stated in answer
 3 to GROSSMAN'S question that he did see a counselor and also took his son to see the counselor.
 4 GROSSMAN claims that because ESPINOZA did not disclose the name of the counselor, or the
 5 length of time he had seen the counselor, that ESPINOZA was lying. Clearly, ESPINOZA
 6 simply answered the question posed by Defendant and Defendant's failure to ask follow-up
 7 questions was the reason for his lack of information. It was not an omission on ESPINOZA'S
 8 part indicating dishonesty.

9
 10 **E. PLAINTIFF'S INVASION OF PRIVACY CLAIM CAN SURVIVE DEFENDANTS**
 11 **MOTION BECAUSE PLAINTIFF HAD A LEGALLY PROTECTED PRIVACY**
 12 **INTEREST, A REASONABLE EXPECTATION OF PRIVACY IN THE**
 13 **CIRCUMSTANCES, AND DEFENDANTS' CONDUCT WAS A SERIOUS INVASION.**

14
 15 As a matter of law, Plaintiff did have a reasonable expectation of privacy with regard to
 16 his personal and confidential information. The "zones of privacy", California Constitution,
 17 Article I, section I, creates a right of action against private as well as government entities and
 18 extend to legally recognized privacy interests in the details of a patient's medical and psychiatric
 19 history. *See Hill v. National Collegiate Athletic Assn.* (1994), 7 Cal.4th 1. "Indeed the
 20 Legislature recognized as much when it enacted section 56.10, allowing health care providers to
 21 disclose only narrow categories of medical information about employees, and then only for
 22 certain narrow purposes" An employee's right of privacy is one that helps workers maintain an
 23 aura of competence, efficiency, professionalism, social propriety, and seriousness of purpose,
 24 allowing them to perform their duties to the satisfaction of their employers but simultaneously to
 25 protect their job security and, thus, their economic well being.

26 As a matter of fact, Plaintiff has never placed his mental ability in issue. It was
 27 Defendant's pretextual examination, which forms the basis of the privacy claim. . Defendants,
 28 without Plaintiff's consent, disclosed private and confidential information about Plaintiff to third

1 parties, including, but not limited to, the entire police force of IMPERIAL. Plaintiff's allegations
 2 of harassment arise from the Police Chief Defendant COLON'S conduct in interfering with
 3 Plaintiff's private and confidential matters. [See Plaintiff's Complaint, Paragraphs, 11, 18, 19].
 4

5 **F. DEFENDANT'S CONDUCT WAS SUFFICIENT TO SUPPORT A CLAIM FOR**
 6 **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.**

7
 8 As indicted in Plaintiff's Complaint, Defendant committed the acts alleged herein
 9 maliciously, fraudulently, and oppressively, and with the wrongful intention of injuring plaintiff,
 10 and acted with an improper and evil motive amounting to malice or despicable conduct.
 11 Alternatively, Defendant's wrongful conduct was carried out with a conscious disregard of
 12 plaintiff's rights. As demonstrated, Defendant had no basis to conclude that Plaintiff was lacked
 13 integrity, yet recklessly or intentionally used such a conclusion, knowing the damage it would
 14 cause Plaintiff.
 15

16 **IV. CONCLUSION/REQUEST FOR LEAVE TO AMEND.**

17
 18 Based on the foregoing, Plaintiff respectfully requests that this Court deny Defendant's
 19 Motion to Dismiss for Failure to State a Claim. In the event that the Court is inclined to grant
 20 the motion, Plaintiff respectfully requests leave to amend this complaint to cure any defects. A
 21 pleading can be amended to state a cause of action against the Defendant. In this case, for
 22 example, the allegations appear to support a violation of 42 U.S.C. §1983 as Defendant does not
 23 dispute that he was CITY and COLON'S agent and acted pursuant to their request.
 24

25 LAW OFFICES OF VINCENT J. TIEN

26
 27 Dated: May 16, 2008

By: s/Vincent J. Tien
 VINCENT J. TIEN, Attorneys for Plaintiff, JOHN
 ESPINOZA

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 17291 Irvine Boulevard, Suite 150, Tustin, California 92780.

On May 19, 2008 I caused to be served the foregoing documents described as: **NOTICE OF STANDING ORDER IN CIVIL CASES** on the parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

David M. White, Esq.
Susan L. Oliver, Esq.
Mina Miserlis, Esq.
WHITE, OLIVER & AMUNDSON
550 West C Street, Suite 950
San Diego, California 92101

Jeffrey P. Thompson, Esq.
Jennifer K. Berneking, Esq.
DECLUES, BURKETT & THOMPSON, LLP
17011 Beach Blvd., Ste. 400
Huntington Beach, CA 92647-7455

BY MAIL: I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Tustin, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on the same day in the ordinary course of business. I am aware that on the motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

BY EXPRESS SERVICE CARRIER: I deposited in a box or other facility regularly maintained by _____, an express service carrier, or delivered to a courier or driver authorized by said carrier to receive documents, each such envelope, in an envelope designated by the said express service carrier, with delivery fees paid for.

xx BY FACSIMILE: I caused the foregoing documents to be sent to the addressee(s) above via facsimile.

BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee above.

(STATE) I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

xx (FEDERAL) I declare that I am employed in the office of the member of the bar of this court, at whose direction this service was made.

Executed this 19th day of May 2008 at Tustin, California.

s/Vincent J. Tien

VINCENT J. TIEN, Declarant.